Petition

81-1593

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INCORPORATED TRUSTEES OF THE
GOSPEL WORKER SOCIETY,

Petitioner,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Where it is shown that a tax-exempt organization is organized and operated for religious purposes and that no part of its net earnings inures to any individual, may the Internal Revenue Service revoke a tax-exempt determination because of its disapproval of certain earnings accumulated for improvements?

2. When the tax-exempt status of the petitioner was reaffirmed by the Government in 1964 after the petitioner ceased to maintain its missions, may the Government in 1976 retroactively revoke its prior ruling for the reason that the missions were no longer maintained?

3. When the issue involved is one of purpose and the petitioner has not had an opportunity to submit its proof, may a court grant the Government's motion for summary judgment by purporting to resolve facts and by relying in part upon the failure of the petitioner to establish certain facts?[1]

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[1] The caption contains the names of all parties.

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PETITION FOR CERTIORARI

The petitioner, The Incorporated Trustees of the Gospel Worker Society, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 4, 1981.

OPINION BELOW

The findings of fact and opinion of the District Court (Appendix A, *infra*, pp. 1a-13a) are reported at 510 F. Supp. 374. No opinion was filed by the Circuit Court. The judgment of the Circuit Court (Appendix B, *infra*, p. 14a) was entered on December 4, 1981. A motion for leave to file out of time a petition for rehearing (Appendix C, *infra*, pp. 16a-17a) was denied by the Circuit Court on February 5, 1982 (Appendix D, *infra*, p. 18a).

JURISDICTION

The judgment of the Circuit Court (Appendix B, *infra*, p. 14a) was dated December 4, 1981, and was entered the same day.

The jurisdiction of the Circuit Court was invoked under 28 U.S.C. §§ 1291 and 1294(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statute is § 501 of the Internal Revenue Code (26 U.S.C. § 501). The material provisions are as follows:

> SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.
>
> (a) EXEMPTION FROM TAXATION. — An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.
>
> * * *
>
> (c) LIST OF EXEMPT ORGANIZATIONS. — The following organizations are referred to in subsection (a):
>
> * * *
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.
>
> * * *

STATEMENT

For some 77 years the Gospel Worker Society has been publishing *The Sunday School Times and Gospel Herald* (J.A. 590, 867). [2] It also conducted missions and engaged in colportage work (App. 2a). Along with these activities the Society for a number of years has been publishing Sunday School lessons which are sold primarily through Christian book stores (App. 3a). On two of these publications the Society makes a substantial profit (J.A. 500-502, 532), while it loses money on a number of additional ones (J.A. 345-346, 573, 582-583, 671-672). The publications contain no advertising (J.A. 867, 927), and all of them are carefully edited by a staff of 11 persons to be certain that the views expressed are in accord with the doctrines of the Society (J.A. 116-118, 729-730, 739). No commercial printing is done for third parties (J.A. 27, 30, 585, 835).

In more recent years because of the age of the ladies and the less safe condition of the streets, the missions have been closed, the colportage work discontinued (App. 2a; J.A. 8, 17, 76-80), and the missionary work has been limited primarily to the distribution without charge of religious material (J.A. 39-43, 590-592, 804, 817, 834). In recent years *The Sunday School Times and Gospel Herald* has been sent semi-monthly without charge to some 14,000 persons (J.A., 588-590, 593-594, 708, 867).

The Internal Revenue Service determined in 1937 that the Society was entitled to a tax-exempt status, and this determination was reaffirmed following examinations in 1953 and 1964 (App. 2a; J.A. 935-940). This latter reaffirmation was made after the missions had been closed (App. 2a).

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[2] Pursuant to Rule 19.1 of the Rules of this Court petitioner has requested the Circuit Court to certify and transmit the Joint Appendix as filed in the Court below. References preceded by "J.A." are to this Joint Appendix.

In 1976 the Service again examined the activities of the Society and determined that the Society was not entitled to a tax-exempt status and that the revocation should be effective as of the fiscal year of the Society beginning in 1970 (App. 4a).

The Society then brought a declaratory judgment suit in the District Court invoking the jurisdiction of that Court under 28 U.S.C. §§ 1346(e) and 2201 and 26 U.S.C. § 7428 (J.A. 6-7). The District Court granted a motion for summary judgment filed by the Government (App. 1a, 13a; J.A. 954), and its action in doing so was affirmed *per curiam* without opinion by the Circuit Court (App. 14a-15a).

REASONS FOR GRANTING THE WRIT

1. It has been the practice of the Internal Revenue Service to withhold or, as here, revoke tax-exempt status for reasons of public policy. The Department of Justice on January 8, 1982, announced that there was no statutory authority for such action. When that occurred the time allowed the Society within which to file a petition for rehearing in the Court of Appeals had expired. The Court denied a motion filed thereafter for leave to file out of time a petition for rehearing (App. 16a-17a). The writ should be granted so that the lack of authority of the Internal Revenue Sevice on "public policy" matters can be judicially determined. The issue involves an important question of federal law which should be settled by this Court.

2. The writ should be granted to resolve a conflict between the Circuits as to the authority of the Internal Revenue Service to make its revocation retroactive when there has been no material change in the facts and the organization has been conducting its affairs during the period involved in reliance upon a prior ruling holding the Society to be a tax-exempt organization. The Courts below in the case at bar upheld the position of the Service. In *Lesavoy Foundation* v. *Commissioner*, 238 F.2d 589, 594 (3 Cir. 1956) and in *Lansons Inc.* v.

Commissioner, 622 F.2d 774 (5 Cir. 1980), the Courts held that such a retroactive revocation was an abuse of the discretion given the Commissioner.

3. The Court below upheld the action of the District Court in resolving factual issues as a part of its grant of summary judgment. Such procedure fails to follow holdings of this Court and also holdings by other panels of the Court of Appeals.

ARGUMENT

The District Court found that the Society meets the organizational test for a tax-exempt organization (App. 16a at fn. 7), and it was conceded in the Circuit Court that none of its profits inures to any individuals. The Courts below apparently upheld the revocation of the Society's tax-exempt status because it had accumulated substantial funds for the replacement of its Web press and for the improvement of its facilities (App. 13a at fn. 20).

The January 8, 1982, Announcement

The Treasury Department and the Department of Justice held a press conference on January 8, 1982, at which they announced a fundamental change of position and said in part (Daily Report for Executives, 1-8-82, p. G-4):

> As a consequence of this decision, the IRS will restore the tax exemption of certain organizations which had previously been revoked. In particular, the appeal of Bob Jones University, and the Goldsboro Schools, which are currently before the Supreme Court will be rendered moot.

The cases mentioned are *Bob Jones University* v. *United States*, 639 F.2d 147 (4 Cir. 1981), certiorari granted October 13, 1981, 70 L.Ed.2d 205, and *Goldsboro Christian Schools, Inc.*, v. *United States*, certiorari granted October 13, 1981, 70 L.Ed.2d 205.

In reaching its decision the Treasury Department stated in part:

> The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970. Thus the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy.

The change of position goes beyond just the issues relating to segregated schools. In connection with the announcement Deputy Treasury Secretary R. J. McNamar stated:

> In taking this action, we are attempting to protect the independence *of all private tax-exempt organizations* — many of which may follow practices and adhere to principles with which we disagree. But before the government gets into the business of deciding which organizations are worthy of tax exemption and which are not, we want Congress to fully consider the implications of such a course. (Italics supplied.)

The Society submits that the Government's statement applies with like force to its situation.

The Role Of Section 501(c)(3)

Section 501(c)(3) of the Internal Revenue Code does not proscribe the accumulation of funds. The attempt of the Internal Revenue Service to add such a test without legislation to that effect is as much a usurpation of the legislative function as is the attempt of the Service to apply a public policy test to deny exempt status to religious schools which do not meet the tests applied by the Service in the area of discrimination.

In its Memorandum to this Court in the cases of the two schools (Nos. 81-3 and 81-1) the United States stated (p. 2):

> * * * the Treasury Department has commenced the process necessary to *revoke forthwith* the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code. (Italics supplied, footnote omitted.)

The Society submits that taxpayers should be treated equally. If there is no statutory authority for denying tax-exempt status to religious schools which may not meet the test of the Service as to discrimination, then other nonstatutory so-called "public policy" tests applied to religious organizations should also be denied enforcement by the Service.

The recognition by the Service of a tax-exempt status is a very valuable asset to an organization. A determination by this Court of the role of the Internal Revenue Service is important to the future role of the Service in this regard and would be of great significance to the thousands of tax-exempt organizations which endeavor to live within the statutory framework of § 501(c)(3) of the Code.

It appears that the denial of the Society's tax-exempt status in the case at bar was based primarily on the conduct of its operations and particularly on the accumulation of funds (App. 7a, 8a, 13a at fn. 20).

As to the basis for such denial, the Society contends that there is no Congressionally determined "public policy" as to the accumulation of funds and that the effort of the Internal Revenue Service to enforce such a policy in the absence of Congressional direction is an interference with a church-state relationship in the case at bar just as it now appears to be in the case of Bob Jones University.

The Court can undoubtedly take judicial notice of the fact that the National Geographic Society is materially enlarging its

plant in the District of Columbia. It undoubtedly has accumulated funds to do so. It is a tax-exempt organization. [3] Appellant can see no distinction between the expanding activities of the National Geographic and its own efforts to enlarge its plant and replace its Web press. Other examples of tax-exempt organizations having substantial funds include:

The American Red Cross
The Methodist Church
The Baptist Church
The YMCA
The Boy Scouts of America
The American Bible Society

If it is improper for the Service to deny tax exemptions in the absence of Congressional direction with respect to segregated schools, then it is equally improper to deny tax exemption in the absence of Congressional direction with respect to the accumulation of income for purposes of plant expansions. Cf. *Samuel Friedland Foundation* v. *United States,* 144 F. Supp. 74 (D.N.J. 1956).

The Summary Judgment Issue

The District Court decided factual questions on several issues which decisions were contrary to the evidence or to affidavits filed by the Society in opposing the motion for summary judgment (J.A. 834, 935-940). [4] Besides holding that the Society

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[3] Cumulative List of Organizations described in Section 170(c) of the Revenue Code of 1954 (Publication 78 (1-81), p. 786), and Supplement thereto revised to July 31, 1981.

[4] The District Court held that as of 1962 "all missionary activity of the Society had ceased" (App. 2a) yet the record shows the Society is still supporting missionary work and mails without charge its publications to persons requesting them (J.A. 39-43, 291-292, 485, 589-592, 708). The District Court held that the members of the Society have "little or no involvement with its publication activities" (App. 2a-3a at fn. 2) yet the Society is the final arbiter on questions as to whether a proposed publication

had failed to carry its burden of proof in several respects (App. 9a at fns. 14 and 15) — even though the Society had not had a chance to go to trial (J.A. 3-5) — the District Court held it could resolve factual disputes in ruling on the motion for summary judgment (App. 8a at fn. 12). Such a procedure is contrary to holdings of this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1961); and *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944), and also holdings of other panels of the Circuit Court. *Leonard* v. *BHJK Corporation*, 469 F.2d 108, 110 (D.C. Cir. 1972); *Rodway* v. *United States Department of Agriculture*, 482 F.2d 722, 727 (D.C. Cir. 1973); and *National Association of Government Employees* v. *Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978).

The extent of the litigation in the tax exempt area shows clearly the need for an authoritative consideration of § 501(c)(3). The case below is a proper one for the attention of this Court.

CONCLUSION

There are conflicts in decisions as to the right of tax-exempt organizations to accumulate funds for exempt purposes and as to the right of the Service in the absence of a material change of facts to revoke retroactively a tax-exempt status once determined. These conflicts require resolution by this Court. The

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is in accord with the doctrines of the Society (J.A. 165, 340, 435, 582, 584, 643, 835). The District Court finds a difference in the facts in the 1970's as compared with those when the determinations of tax-exempt status were made in 1937 and 1953 (App. 12a), but it fails to note that the activities of the Society in the 1970's were "substantially the same" as those in its fiscal year ended June 30, 1963, when the Service determined that the Society was an exempt organization (J.A. 935-940).

issues occur frequently and are of importance in the administration of the tax law. The petition for a writ of certiorari should accordingly be granted.

Respectfully submitted,

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February 1982

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1843

THE INCORPORATED TRUSTEES OF
THE GOSPEL WORKER SOCIETY,

Plaintiff,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TRESAURY,

Defendant.

FILED
January 27, 1981

JAMES F. DAVEY, Clerk

OPINION

This is an action under section 7428 of the Internal Revenue Code of 1954, 26 U.S.C. § 7428, in which plaintiff Incorporated Trustees of the Gospel Worker Society (Society) seeks a declaratory judgment that it is, as a religious organization, exempt from taxation under Code sections 501(a) and 501(c)(3). [1] Before the Court is defendant's motion for summary judgment. For the reasons stated below, the Court holds that plaintiff is no longer entitled to its tax exemption.

I

In 1895, Reverend William Musselman, a Mennonite minister, founded the Gospel Worker Society in New Jersey. The Society was incorporated under the laws of Pennsylvania in 1906. Through the

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[1] The Internal Revenue Service revoked a previously-granted tax-exempt status and plaintiff requests review of that decision.

1930's it maintained missions in various cities in Pennsylvania, Ohio, and New Jersey where its members engaged in public (evangelizing) efforts, such as distributing literature, conducting services, and holding street meetings. By the late 1930's the members consisted of about 80 ladies, who wore uniforms, received no pay for their work, and were maintained by the Society. During this period, the literature distributed by the Society and additional Sunday School materials were printed by the members at their own press, known as the Union Gospel Press. On November 6, 1937, the Internal Revenue Service granted an exemption from income taxation to the Society under section 101(c) of the 1936 Revenue Act (the present section 501(c)(3)), as an organization carrying on charitable, educational, religious, and missionary activities, including the care and maintenance of mission workers and the dissemination of religious literature to charitable, penal, and reform institutions. The exemption letter found that the Society's income was derived from gifts and the operation of the Gospel Press, and that this income was to be used to carry on the Society's religious, charitable, educational, and missionary work. This exemption was upheld in 1953 in a determination by the Internal Revenue Service.

At present, Timothy T. Musselman, the grandson of the founder, is in charge of the Gospel Press. He is without formal church affiliation and his experience prior to joining the Press in 1958 was in the management of commercial plants. The Society membership now consists of 23 mostly elderly ladies, living in a home maintained by the organization at a cost of $500,000 a year. As of 1962, the last mission had closed down, all missionary activity of the Society had ceased due to the advancing age of the membership, and the only discernible activity of the Society, apart from the maintenance of the ladies, was the publication of religious literature through the Gospel Press. Only four of the members actually work in the Press (either on an hourly wage or for a salary) and their input into the content of its publications consists largely in the review of the copy for type and smooth reading as distinguished from matters of substance. The members of the Society have little or no other involvement with its

publication activities.[2] Contributors to the publications, and those responsible for substantive editing, are not members of the Society and they do not belong to any particular denomination.

The Gospel Press presently publishes a line of Sunday School materials, called the "Christian Life Series." The content of the series is dictated by general guidelines established by the Society and such guidelines are given to the outside contributors. The guidelines are not specific with regard to doctrine, and they do not require the authors to advance beliefs in any way unique to the Society. In fact, the materials follow the non-denominational International Sunday School Uniform Lesson Plan, a set of topics prepared by the National Council of Churches — a practice also followed by a number of non-exempt commercial publishers of fundamentalist Christian literature.[3] The Gospel Press pays the Council a royalty of one percent for these topics, and the commercial publishers pay a similar royalty. The Press sells about 60 percent of its publications to Christian bookstores at a standard commercial discount[4] (again much as do the commercial publishers of Sunday School materials). These bookstores, which number approximately 1,000, resell the materials at list price to churches and individuals.

Although some Gospel Press publications are published at a loss, the organization has shown increasing profits since the 1960's. Its accumulated surplus has grown from approximately 2 million dollars through the 1960's to over 5.3 million dollars in 1978. The salaries of the top officials of UGP have similarly increased: Mr. Musselman, for example, received $25,080 in 1970, and $103,387 in 1978.

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[2] From 1964 to 1973, the control of the printing operation was entirely in the hands of an outside board.

[3] These publishers include Scripture Press, Standard Publishing, David Cook Publishing Co., and Christian Publications, Inc. A denial of Scripture Press's tax exemption was upheld in the Court of Claims in *Scripture Press Foundation* v. *United States, infra*.

[4] Of its remaining publications, some are sold to dealers at a higher than commercial discount, but the purchaser rather than the Press pays postage; others (constituting less than 1/2 percent of the total cost of the Gospel Press publications as of 1977) are distributed without charge.

By a report of November 5, 1976, an IRS District Director in Ohio proposed to revoke plaintiff's tax exemption, on the grounds that the religious and charitable activities for which the exemption had been granted had virtually ceased, and that the operation of the publishing business at a substantial profit indicated the existence of a trade or business unrelated to plaintiff's exempt purposes. Plaintiff appealed this proposal to the Regional Commissioner in Cincinnati, who proposed agreement by plaintiff to status as a private foundation with unrelated business income. Plaintiff then appealed to the National Office, which determined on March 17, 1978, that plaintiff's exemption be revoked. On July 12, 1978, a final adverse determination was made to revoke the Society's exempt status effective as of July 1, 1963, and the Regional Commissioner demanded that plaintiff file federal income tax returns for all years beginning July 1, 1970.[5] The instant action followed. As indicated, it requests the Court to declare under Code section 7428[6] that the Society still qualifies for an exemption under section 501(a) as a 501(c)(3) exempt organization, and that defendant's revocation of its exempt status was erroneous.

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[5] The following reasons were given for the final adverse determination:

> During the intervening years from the date of your exemption letter to the present time your activities have changed dramatically. The Union Gospel Press has grown into one of the nation's largest producers of Sunday School literature and religious publications. These publications are not being used to promote the doctrinal beliefs of the Society, but are being sold to existing Protestant religions to be used in promoting their own beliefs. The Gospel Worker Society has little contact with the Union Gospel Press. The content is supplied by an Editorial staff and paid outside contributor writers (none of whom are members of the Society). In summary, the operation of the Union Gospel Press constitutes the primary and only significant activity still being carried on by the Incorporated Trustees of the Gospel Worker Society and this activity is not substantially related to the performance of the functions for which you were granted exemption.
>
> Therefore, your organization does not qualify as one which operated exclusively for one or more of the purposes specified in section 501(c)(3).

[6] Section 7428(a) provides that in a case involving

> a determination by the Secretary . . . with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from taxation under

II

Section 501(a) exempts from taxation organizations described in section 501(c)(3), that is,

> Corporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Under the regulations, an organization is organized exclusively for exempt purposes if its articles of organization "limit the purposes of such organization to one or more exempt purposes" and "do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes." 26 C.F.R.

> section 501(a) . . . the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification. . . . For purposes of this section, a determination with respect to a continuing qualification . . . includes any revocation of or other change in qualification. . . .

Limitations on this jurisdictional provision are provided by section 7428(b), which includes the requirement that a petitioner exhaust his administrative remedies. The parties here agree that administrative remedies have been exhausted.

While section 7428 itself does not contain the standard or scope of review to be employed by the District Court in examining the determination of the Secretary, it has been held, on the basis of the legislative history and the practice of the U.S. Tax Court, that the review is to be *de novo*. *The Big Mama Rag, Inc.* v. *United States*, Slip Opinion at 1 (D.D.C. April 30, 1979), *rev'd on other grounds*, No. 79-1826 (D.C. Cir. Sept. 15, 1980). Normally, the Court's decision will be based on the facts as represented in the administrative record (see Tax Court Rule 217(c)); in the case of revocation, however, the Court may make findings of fact differing from the administrative record (Tax Court Rule 217(c); *Big Mama Rag, Inc. supra*, slip Op. at 1 n.1). The burden of proof is on the petitioner to overcome the ground for denial or revocation set forth in the IRS determination (*Christian Manner International* v. *Commissioner*, 71 T.C. 661, 664-65 (1979)).

§ 1.501(c)(3)-1(b). Plaintiff's Articles of Incorporation, as amended in 1960, clearly meet this test. [7]

The question therefore becomes whether or not plaintiff meets the operational test set forth in the statute and the regulations. An organization is operated exclusively for exempt purposes

> if it engages primarily in activities which accomplish one or more of such exempt purposes. . . . An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. 26 C.F.R. § 1.501(c)(3)-1(c)(1).

The cases interpreting the operational test fall into two types of factual patterns. The first type involves an organization conducting religious activities which also carries on a trade or business for profit. The main inquiry in this type of situation is whether the profit-producing activity is merely incidental to and in furtherance of the religious activities and their exempt purpose. [8] Clearly, plaintiff does

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[7] Paragraph 2 of the Articles of Incorporation reads as follows:

> The purposes for which the said corporation is formed are:
>
> (1) to propagate the Christian Gospel by means of the printing, publication and dissemination of Christian literature and the maintenance of Missions;
>
> (2) to receive and hold property, real and personal, to be utilized in furtherance of the above purposes;
>
> (3) to do whatever is deemed necessary, useful, or conducive to carrying out any of the purposes of the corporation and to exercise all other authority enjoyed by corporations generally by virtue of the provisions of the Pennsylvania Non-Profit Corporation Law; provided, however, that no part of the net earnings of the corporation shall inure to the benefit of any private shareholder or individual, and no substantial part of its activities shall be carrying on propaganda, or otherwise attempting to influence legislation.

[8] See, *e.g.*, *Scripture Press Foundation* v. *United States*, 285 F.2d 800 (Ct.Cl. 1961) (organizations' door-to-door evangelism and religious instructional activities incidental to sale of religious literature for profit); *Saint Germain Foundation* v. *Commissioner*, 26 T.C. 648 (1956) (organization's sale of religious publications producing income incidental to its religious purposes as manifested through the conduct of religious classes and conclaves.)

not fit this pattern. On the factual record of this case the Court finds that plaintiff's primary, if not sole, activity is the income-producing publishing enterprise of the Press. All other significant activities of the Society appear to have ceased years ago. [9]

The second type of case involves an organization whose sole activity is an income-producing one. Since "it is possible for such an activity to be carried on for more than one purpose . . . the critical inquiry is whether petitioner's primary purpose for engaging in its sole activity is an exempt purpose, or whether its primary purpose is the non-exempt one of operating a commercial business producing net profits for petitioner." *BSW Group Inc.* v. *Commissioner*, 70 T.C. 352, 356 (1978). [10]

It is a factual question whether plaintiff's primary purpose in turning a profit has been to further the exempt purpose for which it

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[9] It could perhaps be argued that plaintiff carries on another activity, that is, the maintaining of the retired members of the Society in their home. While clearly not a profit-making venture, this activity does not serve to accomplish the purposes of the Society as set forth in the Articles of Incorporation (*i.e.*, the propagation of the Gospel) given that the members so maintained no longer participate actively in any missionary work. In addition, the fact that the maintenance of the retired members costs only $500,000 a year, while the Gospel Press has an accumulated surplus of over 5 million dollars, plainly refutes any assumption that the Gospel Press activities serve only to further the upkeep of the ladies. See *Scripture Press Foundation* v. *United States*, *supra*, 285 F.2d at 805. In any case, plaintiff does not argue that its publishing activities have been merely incidental to the maintenance of Society workers; it instead contends that the primary purpose of the publishing business is still exempt.

[10] See *e.g.*, *Christian Manner International* v. *Commissioner*, *supra* (petitioner's primary if not sole activity is the promotion, distribution and sale of his book, with the principal non-exempt purpose of turning a profit); *Pulpit Resource* v. *Commissioner*, 70 T.C. 594 (1978) (petitioner's sole activity is the publication and sale of a religious journal, but this furthers as a primary exempt purpose the improving of preaching skills of clergy); *Fides Publishers Association* v. *United States*, 263 F.Supp 924 (N.D. Ind. 1967) (sole activity of plaintiff has substantial non-exempt purpose of the publication and sale of religious literature at a profit).

was organized, [11] and the Court is able to resolve that issue here on the basis of the record before it. [12]

The first factual circumstance which the Court must take into account is the 5.3 million dollars accumulated profits possessed by plaintiff as of 1978. Although the fact that an organization's profits are very large is not conclusive of a non-exempt purpose, it is "evidence indicative of a commercial character." *Scripture Press Foundation* v. *United States, supra,* 285 F.2d at 803. See *American Institute for Economic Research* v. *United States,* 302 F.2d 934, 938 (Ct. Cl. 1962); *BSW Group, Inc.* v. *Commissioner, supra,* 70 T.C. at 357; *Golden Rule Church Association* v. *Commissioner,* 41 T.C. 719, 731 (1964).

Plaintiff asserts that these funds have been gradually set aside since 1970, when a decision was made that the Press' publishing plant needed a thorough renovation and expansion. It is contended that the expansion was designed better to spread the Gospel, and that this purpose is clearly exempt and in conformance with the purposes for which the Society was organized.

While it is theoretically conceivable that a religious purpose may underlie the enormous accumulation of profits since 1970, the sheer size of the surplus and the lack of anything more concrete than the word of plaintiff's officers as to its future use militates against such a finding. [13] Even if it be assumed, *arguendo,* that the funds now accumulated will eventually be used for expansion, it would not help

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[11] *BSW Groups, Inc.* v. *Commissioner, supra,* 70 T.C. at 357.

[12] The only fact as to which plaintiff contends there exists a genuine issue is that of whether or not Society constitutes a "church." But that issue is not in any way determinative of the lawsuit; since section 501 of the Code does not exempt entities entitled "churches," but "corporations . . . operated exclusively for religious . . . purposes." The section 501 determination must be made on the basis of an exemption of the facts from which such purposes can be inferred, not from the label plaintiff applies to itself.

[13] In response to interrogatories, plaintiff has outlined specific plans for the use of the accumulated funds. There is no way of kn wing, however, whether the funds in fact will ever be put to such use, and they have not been legally committed thereto.

plaintiff's case, for the purpose of the expansion may well be the accumulation of still greater profits. Plaintiff has given the Court no basis to find otherwise. [14]

Another material circumstance is the abrupt increase in the salaries of the top personnel of the Gospel Press. As stated above, Mr. Musselman's salary increased from approximately $25,000 in 1970 to over $100,000 in 1978. Two other top officials have received increases from $16,153 to $72,377 and from $5,790 to $42,896, respectively, in the same time period. The officers of a tax-exempt organization may of course receive remuneration for their services without jeopardizing the exemption. See *Pulpit Resource* v. *Commissioner, supra*, 70 T.C. at 612. [15] However, the substantial amount of the salaries at present and the rapidity of their rise is troubling. While they may not be directly indicative of profits inuring "to the benefit of any private shareholder or individual" as prohibited by section 501(c)(3) and the regulations thereunder, they are at least suggestive of a commercial rather than non-profit operation.

Finally, it is significant that the Gospel Press is in direct competition with a number of commercial publishers. Like these publishers, the Gospel Press follows the lesson plan provided by the National Council of Churches; like them, it pays a royalty to the National Council; like them it sells dealers using a similar standard commercial

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[14] The burden of proof to overcome the grounds set forth by the IRS in its revocation lies with the plaintiff (see note 6, *supra*) — that is, plaintiff may overcome the IRS finding that the operation of the Gospel Press is not substantially related to the performance of an exempt function. Plaintiff has not sufficiently established a connection between the accumulation of profits and some religious purpose so as to overcome that finding.

[15] In *Pulpit Resource*, the director of an organization publishing a religious journal received approximately $15,000 per year. The Tax Court found this salary not to be an indication of an intent to drain profits from the operation of the organization, either now or in the future, "because [the director] receives no royalties from his own sermons that are sold and the administrative record reflects his sincerity and devotion to religious concepts." 70 T.C. at 612. Here, the amount of the salaries is far greater, and Mr. Musselman's religious beliefs and affiliations are not a matter of record.

discount; and like them, it directs its publications at the same non-denominational market.[16] It has been held that "[c]ompetition with commercial firms is strong evidence of the predominance of non-exempt commercial purposes." *BWS Group, Inc.* v. *Commissioner, supra,* 70 T.C. 358; *American Institute for Economic Research, supra,* 302 F.2d at 938.

Although none of the factual circumstances enumerated above, taken singly, is conclusively determinative of a non-exempt purpose behind the Press' publishing activities (the sole activity seriously conducted by the Society), taken together they present a picture of a publishing enterprise the primary purpose of which is profits, not salvation. To put it another way, to find that the primary purpose behind the activities of the Gospel Worker Society at the present time is religious rather than commercial would be "to avoid reality." *Fides Publishers Association* v. *United States, supra,* 263 F.Supp. at 935.

Plaintiff in essence argues that the Court must nevertheless hold it to be tax exempt because to do otherwise would amount to governmental interference with religion in violation of the First Amendment. That argument is not well taken. As stated by the Court of Appeals for the Eighth Circuit,

> The receiving of an exemption is . . . a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution. *Parker* v. *Commissioner,* 365 F.2d 792, 795 (8th Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967). See also *Winters* v. *Commissioner,* 468 F.2d 778, 781 (2d Cir. 1972).

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[16] The issue of whether or not an organization's activities are directed toward a specific religion is not determinative of whether the primary purpose behind the organization's activity is to make a profit. *Pulpit Resource* v. *Commissioner, supra,* 70 T.C. at 612. However, in the case of the Gospel Press, the fact that its publications are non-denominational contributes to the resemblance between its publishing activities and those of commercial, non-exempt publishers of Christian literature with whom the Gospel Press competes.

Plaintiff has not shown that the revocation was in any way based upon a judgment of the merits of the religious tenets contained in Gospel Press publications; nor has it attempted to prove illegal discrimination in the revocation of exemption. Indeed, other organizations whose primary activities consist of the publication and distribution of religious literature at a profit have consistently been held liable for the tax on their income, however religiously inspired the sale of such literature might be. See *e.g.*, *Christian Manner International, Inc.* v. *Commissioner, supra; Scripture Press Foundation* v. *United States, supra*.

The Court therefore holds that the Gospel Worker Society no longer qualifies as an exempt organization under section 501(c)(3) of the Internal Revenue Code.

III

The IRS also revoked the Society's exemption effective July 1, 1963, and required it to file federal income tax returns for the year beginning July 1, 1970, and all subsequent years. The reason given for this retroactive revocation was that "all missions and missionary activity ceased by [July 1, 1963]." [17]

26 C.F.R. § 601.201(1)(5) provides that revocations of prior rulings will not be applied retroactively where

> (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the fact on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, *and* (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment (emphasis added). [18]

Plaintiff submits that it meets all of the tests enumerated in this regulation. The Court cannot agree. The facts upon which the revocation is based *are* materially different from the facts upon which the

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[17] IRS letter of July 12, 1978.

[18] See *Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957); *Lansons, Inc.* v. *Commissioner*, 46 AFTR 2d 80-5448, 80-5450 (5th Cir. 1980).

1937 ruling and its affirmation in 1953 were based, and the Society therefore does not qualify under the second condition of the regulation. At those earlier times, the Society's missionary work was thriving, and it could realistically be said that the income produced by its publishing enterprise was used to carry on its religious and missionary activities. Since approximately 1960, the situation has drastically changed. The printing and distribution of religious literature is no longer an integral part of and incidental to the religious activities of plaintiff, because those activities have effectively ceased to exist. Meanwhile, the publishing business has taken on more and more of a commercial hue and has become a highly efficient business venture. [19]

Plaintiff has not met its burden of showing that IRS's action was erroneous in revoking its exemption retroactively to 1963, and in requiring returns to be filed beginning in 1970. See note 6, *supra*. 1963 was the first year in which the Society ceased to operate any missions; 1970 was the year in which its accumulated surplus began

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[19] In addition, the Society probably fails to qualify under the fifth condition of the regulations in that it is unclear that plaintiff's continued reliance on the Commissioner's earlier exemption determination was reasonable. 26 C.F.R. § 1.501(a)-1(a)(2) provides that

> an organization that has been determined . . . to be exempt under section 501(a) . . . may rely upon such determination so long as there are not substantial changes in the organization's character, purposes, or methods of operation.

The character of plaintiff's operations has substantially changed since it was determined to be an exempt organization. It therefore had no right to continue to rely upon that determination under the cited regulation.

its drastic rise.[20] Plaintiff has presented no reason why the Court should reject these particular dates as ill-chosen. The Court affirms the final adverse determination of the Internal Revenue Service of July 12, 1978, declares under section 7428 of the Internal Revenue Code that the Gospel Worker Society does not qualify as a tax-exempt organization under sections 501(a) and 501(c)(3), effective retroactively to July 1, 1963, and directs that plaintiff file federal income tax returns for the year beginning July 1, 1970 and all subsequent years. An order is being entered accordingly contemporaneously herewith.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

Dated: January 26, 1981

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[20] The Society's accumulated surplus has grown as follows since 1963:

Year Ending	Net worth or Surplus
June 30, 1963	2,184,068
June 30, 1964	2,029,999
June 30, 1965	1,989,304
June 30, 1966	1,979,291
June 30, 1967	1,984,181
June 30, 1968	2,081,147
June 30, 1969	2,069,839
June 30, 1970	2,705,823
June 30, 1971	3,463,569
June 30, 1972	3,918,455
June 30, 1973	4,548,822
June 30, 1974	4,903,005
June 30, 1975	5,082,177
June 30, 1976	5,317,316
June 30, 1977	5,275,027
June 30, 1978	5,321,248

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-01843

THE INCORPORATED TRUSTEES OF
THE GOSPEL WORKER SOCIETY,

Appellant,

v.

UNITED STATES OF AMERICA,

FILED
December 4, 1981

GEORGE A. FISHER
CLERK

Appeal From The United States
Court For The District Of Columbia

Before: Tamm, MacKinnon And Edwards, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed for the reasons set forth

in the opinion of District Judge Harold Greene dated January 26, 1981.

Per Curiam
For the Court

GEORGE A. FISHER
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1249

THE INCORPORATED TRUSTEES OF
THE GOSPEL WORKER SOCIETY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TRESAURY,
Defendant-Appellee.

RECEIVED
January 18, 1982

CLERK OF THE UNITED STATES COURT OF APPEALS

MOTION FOR LEAVE TO FILE OUT OF TIME A PETITION FOR REHEARING

Comes now the appellant, by its attorney, and MOVES the Court for leave to file out of time the accompanying petition for rehearing.

In support of its motion appellant states that the Judgment of this Court was entered on December 4, 1981; that a petition for rehearing was not filed within the time allowed to the Society by this Court's Rule 14(a) as amended November 30, 1981, because the Society did not believe that it could urge any grounds which had not been previously set forth in its briefs and in oral judgment; that on January 8, 1982, the Treasury Department announced a major change of position with respect to church-state issues involving the tax-exempt status of religious organizations; that the Government on January 8, 1982, withdrew its opposition in the cases involving the tax-exempt status of *Bob Jones University* v. *United States*, certiorari granted October 13, 1981, 70 L Ed 2d 205, and *Goldsboro Christian Schools*,

Inc. v. *United States*, certiorari granted October 13, 1981, 70 L Ed 2d 205; and that the Society believes that the Court should consider its case in the light of these new and very favorable developments.

WHEREFORE, the Society prays that this motion be granted.

/s/ SCOTT P. CRAMPTON
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(202) 223-4260
Attorney for the Society

January 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-01843

THE INCORPORATED TRUSTEES OF
THE GOSPEL WORKER SOCIETY,

Appellant,

v.

UNITED STATES OF AMERICA,

AFUED 11-24-81

FILED
February 5, 1982

GEORGE A. FISHER
CLERK

Before: Tamm, MacKinnon And Edwards, Circuit Judges

ORDER

On consideration of the motion of appellant for leave to file out of time a petition for rehearing, it is

ORDERED by the Court that the aforesaid motion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

Opposition

Supreme Court, U.S.
FILED
MAR 30 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1593

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE INCORPORATED TRUSTEES OF THE GOSPEL WORKER SOCIETY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1593

THE INCORPORATED TRUSTEES OF THE GOSPEL WORKER SOCIETY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This federal income tax case presents two issues: (1) whether the courts below correctly held that petitioner's tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.)[1] should be revoked because petitioner was not operated exclusively for "religious, charitable * * * or educational purposes," and (2) whether the courts below correctly upheld the Commissioner's determination that petitioner must retroactively file tax returns beginning with 1970.

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[1]Section 501(c)(3) exempts from income taxation those organizations which are "organized and operated exclusively," *inter alia*, for "religious, charitable * * * or educational purposes."

The pertinent facts may be summarized as follows: From 1906, when it was incorporated under Pennsylvania law, until some time prior to 1963, petitioner engaged in public evangelizing efforts in various cities in Pennsylvania, Ohio, and New Jersey. Those activities included distributing religious literature, conducting services and holding street meetings. Petitioner's members consisted entirely of single women who wore uniforms, received no pay for their work, and were maintained by petitioner. At present, petitioner's membership consists of 23 mostly elderly women, living in a home in Cleveland, Ohio, maintained by petitioner at a cost of approximately $500,000 a year. Petitioner also conducts a substantial publishing operation in Cleveland, known as United Gospel Press (Press), which publishes nondenominational fundamentalist Christian literature, primarily for use by Sunday schools.

The Press was founded early in the century to print the literature distributed by the women in their missionary work, but it soon began also to print Sunday school materials. Beginning in the early 1960's, shortly after the missionary work ceased, the Press substantially expanded its operations until, by the time of trial, its annual net income exceeded $645,000 and its accumulated surplus passed $5.3 million. Its two top executives, non-members of petitioner, were paid salaries in 1978 of $103,387 and $72,377 respectively. Only four of petitioner's members work for the Press and, of those, only one performs other than routine services such as proofreading (Pet. App. 1a-3a, 9a).

The Internal Revenue Service granted petitioner an exemption from income taxation as a religious organization in 1937. The exemption was reviewed and upheld in subsequent determinations by the IRS in 1953 and 1964. In 1978, however, the Service revoked petitioner's exemption effective as of July 1, 1963, and ordered petitioner to file federal income tax returns for all years beginning July 1,

1970, and thereafter. Petitioner brought this suit in the United States District Court for the District of Columbia under Section 7428(a)(1) of the Internal Revenue Code of 1954 for a declaratory judgment as to its exempt status (Pet. App. 4a). The district court granted the government's motion for summary judgment, holding that petitioner no longer qualified as an exempt organization under Section 501(c)(3) because it was not operated exclusively for exempt purposes but, rather, primarily for the purpose of conducting a commercial business at a profit. The district court also found that petitioner did not meet its burden of showing that the Service acted erroneously in retroactively revoking its exemption (Pet. App. 10a-13a). The court of appeals affirmed on the basis of the district court's opinion (Pet. App. 14a).[2]

1. The decision below correctly held that petitioner is no longer eligible for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 because since 1963, it has not been "* * * operated exclusively for religious * * * purposes." As this Court observed in *Better Business Bureau* v. *United States*, 326 U.S. 279, 283-284 (1945),[3] an

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[2]Contrary to petitioner's argument (Pet. 8-9), the district court properly granted the government's motion for summary judgment. In support of that motion, the government submitted 35 detailed paragraphs of material facts. In response, petitioner raised only the question whether it should be described as a "church" or as a "voluntary religious society." The district court therefore properly proceeded to decide the case on the basis of a set of facts the accuracy of which was never challenged. Indeed, none of the alleged contraditions between the district court's findings and the evidence now cited by petitioner (Pet. 8-9 n.4) casts doubt upon the correctness of the decision below that petitioner was not operated exclusively for religious purposes.

[3]Although *Better Business Bureau* arose under Section 811(b)(8) of the Social Security Act of 1935, ch. 531, 49 Stat. 639 rather than under Section 501(c)(3) of the Code, the language of the two provisions is almost identical, and their intent is the same. See *Scripture Press*

organization will not qualify as exempt if its commercial activities are substantial, even though not predominant. Here, it is undisputed that petitioner conducts a multi-million dollar publishing operation that competes vigorously and successfully with wholly commercial firms in a clearly defined and recognized commercial market, that its publications are tailored to appeal to the same broad non-denominational market served by its competitors, that it has accumulated a substantial surplus while paying handsome salaries to its non-member executives while its members, who years ago gave up active missionary work, are but minimally involved with the editorial function or other aspects of the publishing operation. There was accordingly a solid basis for the district court's finding that "[o]n the factual record of this case * * * plaintiff's primary, if not sole, activity is the income-producing publishing enterprise of the Press. All other significant activities of the Society appear to have ceased years ago." (Pet. App. 7a). Indeed, as the district court put it, "to find that the primary purpose behind the activities of the Gospel Worker Society at the present time is religious rather than commercial would be 'to avoid reality' " (Pet. App. 10a).

In these circumstances, it is settled that an organization is not entitled to exemption from income tax, whether the destination of its business income be to charitable uses or otherwise. *John Danz Charitable Trust* v. *Commissioner*, 231 F. 2d 673 (9th Cir. 1955), cert. denied, 352 U.S. 828 (1956); *Scripture Press Foundation* v. *United States*, 285 F. 2d 800 (Ct. Cl. 1961), cert. denied, 368 U.S. 985 (1962);

Foundation v. *United States*, 285 F. 2d 800 (Ct. Cl. 1961), cert. denied, 368 U.S. 985 (1962). Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 1.501(c)(3)-1(c)(1), provides, in relevant part, that "an organization will not be so regarded [*i.e.*, as operated exclusively for an exempt purpose] if more than an insubstantial part of its activities is not in furtherance of an exempt purpose."

People's Educational Camp Society, Inc. v. *Commissioner*, 331 F. 2d 923 (2d Cir. 1964); *Western Catholic Church* v. *Commissioner*, 73 T.C. 196 (1979), aff'd 631 F. 2d 736 (7th Cir. 1980), cert. denied, 450 U.S. 981 (1981); *Greater United Navajo Development Enterprises, Inc.* v. *Commissioner*, 74 T.C. 69 (1980), aff'd by unpublished order, No. 80-7254 (9th Cir. Dec. 23, 1981).[4]

2. Petitioner also challenges (Pet. 4-5) the retroactive revocation of its income tax exemption. But the relevant Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 1.501(a)-1(a)(2), provide that an organization may rely upon a determination of exemption only "so long as there are no substantial changes in the organization's character, purposes, or methods of operation." Here, the decision below turns on the fact-bound determination that petitioner's operation had changed since its inception. Retroactive revocation was therefore entirely within the Commissioner's authority. Indeed, this Court has upheld the Commissioner's power to revoke an organization's tax exemption retroactively. *Automobile Club* v. *United States*, 353 U.S. 180 (1957).

Nor does the decision below conflict with *Lesavoy Foundation* v. *Commissioner*, 238 F. 2d 589 (3d Cir. 1956), and *Lansons, Inc.* v. *Commissioner*, 622 F. 2d 774 (5th Cir. 1980), as petitioner asserts (Pet. 4). In *Lesavoy Foundation*, the Commissioner was held to have abused his power to impose revocation retroactively because such action would have made the taxpayer "liable for a tax bill so large as to

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[4]Petitioner urges (Pet. 5) that the decision below requires review in light of *Goldsboro Christian Schools, Inc.* v. *United States* (No. 81-1), and *Bob Jones University* v. *United States* (No. 81-3), which are both currently pending before the Court. But apart from the fact that those cases also involve the general issue of tax exemption, they present questions of statutory construction that are unrelated to the factual question presented here as to whether petitioner has been "operated exclusively for religious * * * purposes."

wipe it out of existence" (238 F. 2d at 594). In *Lansons, Inc.*, the court likewise declined to approve retroactive revocation of the exemption of a pension plan where the Commissioner's case rested on "a variation in the coverage percentages" and the retroactive revocation would have produced "an inordinate adverse effect" (622 F. 2d at 778).

The facts of this case, however, are not at all comparable. Here, during the preceding decade, petitioner amassed a surplus in excess of $5 million while competing vigorously and successfully with other large commercial religious publishers. To be sure, payment of the taxes in question will require some alteration of its ongoing operations. But the principal result of revocation will not destroy petitioner's operation but simply delay expansion of its facilities (for which the surplus has been earmarked) and thereby perhaps reduce its immediate competitive power in its chosen publishing market (Pet. App. 8a). Revocation of its exemption would, albeit belatedly, but justifiably, place petitioner on the same tax and economic footing with the other commercial publishers with which it has competed during those years.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1593

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE INCORPORATED TRUSTEES OF THE
GOSPEL WORKER SOCIETY,

Petitioner,

v.

UNITED STATES OF AMERICA,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1593

THE INCORPORATED TRUSTEES OF THE
GOSPEL WORKER SOCIETY,

Petitioner,

v.

UNITED STATES OF AMERICA,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Society disagrees with the statement of the first issue as set forth in the Memorandum for the Government (p. 1). The Society *is* operated exclusively for "religious" and "educational" purposes. Once it is admitted that no part of its earnings inures to any individual (Govt's Cir. Ct. Br. 14, 30), it is difficult to see what "other" purpose there could be for its operation.

1. The Internal Revenue Service following an extended examination determined in 1964 that the Society was entitled to a tax-exempt status (App. 2a; J.A. 935-940). *This occurred after the missions had been closed* (App. 2a). The courts below did not determine that any basic changes occurred in the operations of the taxpayer between 1964 and 1976 (App. 2a-4a, 14a).

In its statement of facts on page 3, the Government suggests that the Press substantially expanded its operations in the early 1960's. The significant facts are (J.A. 41):

Fiscal Year Ended In	Net Sales	Net Worth	Consumer Price Index [1]
1964	$1,506,010	$2,029,999	94.6
1976	2,805,889	5,317,316	165.2

The foregoing figures indicate that — after allowance for inflation — the Society was experiencing only a moderate growth. As a matter of arithmetic when the 1964 figures are adjusted to correlate with the consumer price index, the 1964 net sales for comparison purposes would be equivalent to $2,629,946 [2] and the 1964 net worth would be equivalent to $3,544,988. [3] Since the purpose of the accumulation was to replace an expensive Web Press and make other plant improvements (App. 8a), the accumulation is well within a reasonable amount.

The Government contends that the Society was not operated exclusively for exempt purposes but shows no "other" purpose for its operations. It asserts that the Society was conducting a commercial business for a profit. This conclusion is reached without a trial on the merits and is contrary to the affidavit confirming the religious purposes of the Society (J.A. 834-835). This affidavit complied with Rule 56 of the Federal Rules of Civil Procedure. The failure to grant the Society a trial is inconsistent with the holdings in *Adickes* v. *Kress Co.*, 398 U.S. 144, 157 (1970), and *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1961).

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[1] Statistical Abstract of the United States, 100th Edition, 1979, p. 483, Table No. 790, All Commodities.

[2] 1,506,010 : 94.6 :: X : 165.2.

[3] 2,029,999 : 94.6 :: X : 165.2.

It should be noted that the statute involved does not prevent an exempt organization from making a profit. If it did, then the National Geographic and the American Bible Society would not qualify for exemption.

It is this engrafting of an additional test, a supposed commercial result, on to a § 501(c)(3) determination that is improper, absent some action by Congress. That is the thrust of the argument for the Government in the *Bob Jones University* case;[4] it should not be heard to contend otherwise in this proceeding.

While the Government argues (p. 4) that the Society competes vigorously with other wholly commercial firms, the same can be said for numerous other tax-exempt organizations such as the National Geographic.

2. It seems apparent that the "inordinate adverse effect" mentioned in the case of *Lansons, Inc.*, (Govt. Br. 6), applies with like force to the situation of the Society. The conflict exists despite slightly different language in the opinions.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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[4] In its Brief to this Court filed on March 3, 1982, in Nos. 81-1 and 81-3, the United States expressed its contention as follows (p. 13):

> *** the Internal Revenue Code — from which all the Commissioner's authority is derived — neither authorizes nor contemplates *this kind of broad administrative discretion*. (Italics supplied.)

See also the position stated in the last sentence of footnote 19 of the Government's Brief (*Op. cit.*, p. 22).